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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT HAROLD BROWN,

Defendant and Appellant.

H035456

(Santa Clara County
Super.Ct.No. BB837105)

Defendant Robert Harold Brown appeals from a judgment of conviction following his no contest plea to forging a driver's license and checks. Counsel for defendant has filed an opening brief that states the case and facts but raises no issues. (See *People v. Wende* (1979) 25 Cal.3d 436.) Defendant, as he is entitled to do, filed his own letter brief. We have, as required by *Wende* and *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124, set forth herein the facts, the procedural background (including a description of the crimes of which defendant was convicted), and the disposition of defendant's case; reviewed the entire relevant record; and considered defendant's arguments.

We will affirm the judgment.

PROCEDURAL BACKGROUND AND FACTS

I. Facts

Because defendant pleaded no contest, we take the facts from a waived probation referral and a hearing on a motion to replace defense counsel (*People v. Marsden* (1970) 2 Cal.3d 118).

A police officer carried out a traffic stop and discovered defendant in possession of 10 forged checks totaling \$5,438.23. The checks showed defendant as the payee and the Alvarado Street Bakery, defendant's former employer, as the issuer. Alvarado Street Bakery had not issued the checks, and the account number on them belonged to a different entity. The officer also found a driver's license showing some data belonging to defendant, but the license had been issued to a different person.

II. *Procedural Background*

A felony complaint filed on November 6, 2008, charged defendant with possessing a forged driver's license with the intent to use it to facilitate the commission of a forgery (Pen. Code, § 470a) and forgery of checks (§ 470, subd. (d)).¹ The complaint alleged that defendant had been convicted of a felony for which he served a prior prison term. (§ 667.5, subd. (b).)

On December 28, 2009, the trial court held a closed ex parte hearing to consider defendant's *Marsden* motion to replace his counsel. Most of the hearing consisted of defendant's explaining and apologizing for a failure to appear timely in court and the court's explaining procedural matters to defendant. At one point, defendant mentioned that he thought the search of his vehicle and seizure of evidence from it followed a pretextual traffic stop and that the arresting officer behaved aggressively. He did not complain, however, that his counsel improperly failed to file a motion to suppress the evidence (§ 1538.5) derived from the traffic stop.

The trial court denied the *Marsden* motion. Defendant then pleaded no contest to the charges and admitted the allegation. After striking the prior prison term enhancement pursuant to the plea agreement, the trial court sentenced defendant to 16 months in state

¹ Further statutory references are to the Penal Code unless otherwise indicated.

prison, with 52 days' presentence confinement credit under section 2933.1 and 52 days' presentence good conduct credit under section 4019.

DISCUSSION

I. *Legality of Search and Seizure; Ineffective Assistance of Counsel*

Defendant claims that the arresting officer abused his authority by treating him roughly during the traffic stop and pulling him over on a pretext. He also faults counsel for failing to bring a motion to suppress the evidence (§ 1538.5) derived from the traffic stop.

If the officer mistreated defendant by acting too roughly toward him, defendant's remedy is not suppression of the evidence. The Fourth Amendment does not remedy abusive police conduct of this type by suppressing evidence; rather, the remedy is a civil suit. (See *Hudson v. Michigan* (2006) 547 U.S. 586, 588-589, 590-594; *U.S. v. Nichols* (6th Cir. 2008) 512 F.3d 789, 794-795.)

Defendant's claim of a pretextual stop contains components both of a substantive violation of the Fourth Amendment and ineffective assistance of counsel. Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result." (*Ibid.*) A claim of ineffective assistance of counsel in violation of the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) The *Strickland* standards also apply to any claim by a defendant

under article I, section 15 of the California Constitution. (E.g., *People v. Waidla* (2000) 22 Cal.4th 690, 718.)

In his *Marsden* hearing, defendant admitted that he had a cracked windshield. He denied only that the officer could have seen it from his vantage point. The record provides no basis to support the latter assertion. As for the legal justification for the stop, a cracked windshield is a defect that may constitute a violation of the traffic laws. (Veh. Code, § 26710.) The record provides no basis to doubt that the windshield in defendant's vehicle was defective under the Vehicle Code. Thus, the initial stop of defendant was proper, and the record does not contain any suggestion that the officer's subsequent search of the vehicle was improper; it may, for example, have been justified by the automobile or search incident to arrest exceptions to the Fourth Amendment's warrant requirement. (See *Arizona v. Gant* (2009) 556 U.S. ___, ___, ___ [129 S.Ct. 1710, 1714, 1716, 1721].) Because the question was not litigated before the trial court, defendant has not preserved his claim for review. (Defendant denies in his letter brief that he consented to the search, and we do not address that possibility. He also asserts that the officer was claiming inaccurately that he had a right to search because defendant was on parole. We do not address the possibility that the search could have been justified as a parole search either.) Thus, from all that appears before us, there was no Fourth Amendment violation for which suppressing the evidence obtained from defendant's vehicle would be the correct remedy. It would have been futile to bring a motion to suppress under these circumstances, and "[r]epresentation does not become deficient for failing to make meritless objections." (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.) Accordingly, there was no ineffective assistance of counsel.

To the extent that defendant is renewing his *Marsden* claim here, review is subject to the abuse of discretion standard. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1003.) We discern no abuse of discretion by the trial court in denying it.

II. *Presentence Custody Credits*

Defendant claims that he was entitled to 210 days' credit, not 104 days' credit, because while he was not in custody (he had been released on his own recognizance) he reported to his probation officer every Thursday.

Section 2900.5 provides for presentence custody credit, but only while an individual is confined in an institution. Credit is not available for time that defendant spent out of custody while awaiting trial and during which he was free to move about. "The lynchpin for the receipt of custody credits is that one be 'in custody.'" (*People v. Anaya* (2007) 158 Cal.App.4th 608, 613, fn. 4.)

III. *State of the Record*

Our own review of the entire relevant record discloses no other arguable issue on appeal.

For the foregoing reasons, we will affirm the judgment.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Mihara, J.